

UNITED STATES DISTRICT COURT

DISTRICT OF DELAWARE

ARBUTUS BIOPHARMA CORPORATION : Case No. 1:22-cv-00252-MSG
et al. :
Plaintiffs, :
v. : Philadelphia, Pa.
: October 12, 2023
MODERNA, INC. et al. : 1:31 p.m.
:
Defendants. :
.

TRANSCRIPT OF TELEPHONIC CONFERENCE HEARING
BEFORE THE HONORABLE MITCHELL S. GOLDBERG
UNITED STATES DISTRICT COURT JUDGE

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1 (Call to Order of the Court)

2 THE DEPUTY CLERK: Yes, Judge.

3 THE COURT: Okay. I think we had a call from --
4 well, let's just go through and see who's on the phone. We had
5 a call from, I think, someone from the public, wanted to be on
6 the call.

7 I know there's 18 Lawyers on the call. It's a pretty
8 straightforward discovery discussion. And I'm happy to get
9 everyone's name on the record.

10 But I absolutely just want one Lawyer from each side
11 to have a dialogue with. So who's going to speak for
12 Plaintiffs?

13 ADAM HARBER: Good morning, Your Honor. This is
14 Adam Harber from Williams & Connolly. I represent Genevant and
15 I'll be speaking for both Plaintiffs.

16 THE COURT: Both Plaintiffs, okay. And who's on for
17 Moderna?

18 BRIAN EGAN: Hi, good afternoon, Your Honor. This
19 is Brian Egan from Morris Nichols on behalf of Moderna. And
20 joining me today are Mark McLennan and Patient Carson from
21 Kirkland & Ellis. And with the Court's permission,
22 Mr. McLennan will handle the argument on behalf of Moderna.

23 THE COURT: Mr. McLennan, sure. Okay. I'm happy to
24 get a roster of who's on the phone. But I don't think that's
25 necessary. There's a lot of Lawyers on the phone.

1 I think our conversation will be shorter than the
2 time it would take to get all the Lawyers on the phone. So you
3 all are of record.

4 And is there anyone on the phone who's not a Lawyer,
5 as part of this litigation? Please identify yourself.

6 ANI PADIL: Judge, this is Ani Padil (phonetic). I
7 am an Attorney. But I'm not appearing in any capacity for the
8 Parties.

9 THE COURT: You're not with one of the Parties?

10 MR. PADIL: That's correct.

11 THE COURT: Okay. So I don't think we're going to
12 talk about anything that's going to require any confidentiality
13 or sealing.

14 But just so the Lawyers know, we did get a call from
15 someone. I'm not even sure who, said that they were a member
16 of the public.

17 I assume it's Counsel who just identified himself,
18 asked if he could be part of the call. And I, of course, said,
19 yes. This is a public proceeding. If we get into -- wade into
20 things that either Counsel from either Party thinks are
21 sensitive and are worthy of being sealed or confidential, just
22 let me know.

23 So I've looked over what I think are the disputes.
24 I'm going to give you my two cents, as to how I think they
25 should be resolved. And then, of course, I'll get input from

1 each Lawyer.

2 I understand the first dispute involves a request
3 from Plaintiff that Moderna's CEO be added to the 10 Custodians
4 identified in the initial disclosures, who may have
5 information.

6 My suggestion, subject to input, would be, why
7 doesn't Plaintiff digest all of the information you're going to
8 get from the 10 that have been identified? And then, if
9 there's an additional need to add the Moderna CEO, I think it's
10 pronounced Bancel, I give you my word. We can always revisit
11 that later.

12 But, to me, it doesn't make much sense to have a
13 Biggers debate over that, when you're going to get enormous
14 amounts of information. So, I would just ask that Plaintiff
15 just hold that card in your pocket and then put it out on the
16 table, if you think it's necessary. So, let me ask Mr. Harber
17 if that's acceptable to you at this time.

18 MR. HARBER: Well, Your Honor, obviously if that's
19 how Your Honor rules, we can live with that. I would suggest
20 that we were trying to raise the dispute now instead of later.
21 But because we think there are a voluminous number of documents
22 and a -

23 THE COURT: Well, why are you insisting on making it
24 -- you don't even know what documents you're going to have. So
25 why are you couching it as a dispute, before you've even

1 reviewed the voluminous amount of documents you're going to
2 get? Why is it a dispute?

3 MR. HARBER: Well, Your Honor, in our view, it's a
4 dispute because, from the information we have, it suggests that
5 Mr. Bancel was extensively involved and one of, frankly, the
6 key witnesses in a number of areas in this case, ranging across
7 time.

8 He personally had discussions with an Inventor of the
9 Patent of the suit, Mr. McLaughlin, wherein which no one else
10 was reported to have been present about licensing. He
11 discussed collaboration with the Predecessor of Arbutus that is
12 one of the bases of our assertion of willful infringement in
13 this case. He personally signed the Government Contracts that
14 Moderna had with the Government.

15 THE COURT: I mean, I don't -

16 MR. HARBER: He -

17 THE COURT: - doubt that the -- am I saying it
18 right? His name is Bancel?

19 MARK MCLENNAN: That's correct, Your Honor.

20 MR. HARBER: I believe so, Your Honor.

21 MR. MCLENNAN: Yes.

22 MR. HARBER: Yes.

23 THE COURT: I mean, I don't dispute that Mr. Bancel
24 is part of important information. I'm just saying I'm going to
25 bet that you're going to get most, if not all of, if not

1 redundant information about all the topics that you're raising.

2 So I'm not ruling against you. I'm just suggesting
3 you should wait and see. I mean, it's going to -- my
4 anticipation is case is going to start to heat up and we're
5 going to have a lot to talk about with discovery. And I'm
6 trying to set a tone that disputes that aren't ripe don't need
7 to be fought over until you've digested it.

8 So, I get what you're saying, Mr. Harber. I hear
9 you, that he's all in all the documents. And you might as well
10 -- we might as well dispute it now. I understand your
11 position. What's Moderna's position?

12 MR. MCLENNAN: Your Honor, Mark McLennan here. I
13 think we completely agree with Your Honor that it's premature.
14 They're going to get an enormous amount of discovery in this
15 case from 10 Custodians that they've identified as having most
16 relevant ESI, including on the issues that Plaintiffs touched
17 on, including Patent licensing, the U.S. Government Agreements
18 by the two people who were most intimately involved with them.

19 And we are sure that, once they receive those emails,
20 they'll be able to confirm that they do, in fact, have the most
21 relevant ESI. If that turns out to be not the case, we're, of
22 course, happy to speak with them. But it doesn't make sense to
23 do that, until they've got documents.

24 THE COURT: Okay. Mr. Harber, I assure you that you
25 can raise this again, if you're not satisfied that you're

1 getting -- you need to add an 11th person or substitute.

2 But I'm going to -- and I'll put all this into an
3 Order -- I'm going to deny the request to add Mr. Bancel now.
4 It'll clear say, without prejudice, such that Plaintiffs can
5 reraise it at a later time.

6 And the next issue is I believe Plaintiff wants all
7 of the documents. And I think there they use that language,
8 "all the documents" in the Modern v. Pfizer litigation.

9 So I'm going to ask Plaintiffs' Counsel, Mr. Harber,
10 just really briefly. That case is in the District of Delaware
11 in front of Judge Connolly. And -- no, it's in New York.
12 Where is it? Where is the litigation?

13 MR. HARBER: I believe it's in District of
14 Massachusetts, Your Honor.

15 THE COURT: Oh, okay. And just give me four
16 sentences on -- I think I know what it's about. But what are
17 the issues in that case?

18 MR. HARBER: So, the issues in that case is that
19 Moderna has, certainly after our lawsuit, brought that case
20 after Pfizer, asserting that Pfizer's COVID-19 vaccine
21 infringes a number of Moderna's own Patents. And -

22 THE COURT: Got it.

23 MR. HARBER: - asserting in that Complaint that the
24 Patents also covered Moderna's products, which would presumably
25 be the subject of Moderna's document production.

1 THE COURT: Right; so it's vaccine v. vaccine, as
2 opposed to this case, which is delivery systems-based. Okay.
3 So, I would suggest -- again, I just have a suggestion.

4 I think that I'd say to Plaintiffs, Mr. Harber, I
5 mean, requesting all documents is a lot. And it is a bit
6 overbroad. Have you tried to speak with Moderna about giving
7 them categories of documents?

8 MR. HARBER: We have. And to be clear, the request,
9 Request 118, is for documents produced in that case relating to
10 the accused products.

11 Now, obviously, the least burdensome thing to do
12 would be to just reproduce whatever is produced in that case,
13 because it wouldn't involve a search. And it wouldn't involve
14 anything but just literally burning another DVD with the
15 production on it.

16 We have tried to negotiate with Moderna regarding
17 categories. And they have, I think both in their letter and
18 with us, identified categories of documents they think might be
19 at-issue in that case which, in their view, wouldn't be
20 relevant here.

21 But all of those, we disagree with them. So, for
22 example, they say that the technology of those Patents is
23 different. And we disagree. I mean, some of them relate to
24 lipid nanoparticles with components like -

25 THE COURT: Have you constructed a -- sorry to

1 interrupt.

2 MR. HARBER: That's okay.

3 THE COURT: Have you constructed categories that
4 you've suggested would be appropriate?

5 MR. HARBER: We have -- what we have requested is
6 all of the documents about the accused products in this case.

7 THE COURT: Okay. Well, I think that there surely
8 is overlap. That's my impression. So I'm with you there. And
9 why don't you suggest some categories, and make some -- think
10 them through. Don't just hit them with a truckload of
11 categories.

12 And make them well-thought out and tightened, and
13 restructure your request. And I'll probably -- if I have to
14 come back and mediate this, and I see that your request for
15 categories is reasonable, and you can explain to me why there
16 would be possible overlap in the two cases, Mr. Harber, I'm
17 going to support you on that.

18 So why don't you start with giving them categories,
19 and then see what their reaction is? Okay?

20 MR. HARBER: Yes, we can do that. Thank you,
21 Your Honor.

22 THE COURT: Great, okay. So, listen. I think those
23 are the only two things that are on my plate. I'm happy to
24 talk about anything else.

25 I think there would be other Judges that I respect

1 that would say, don't say this, Judge Goldberg. Don't say
2 this, Mitch, which is going to be -- it's going to come back to
3 haunt you.

4 But I'm telling everyone on the phone here I
5 understand this is a big case and I understand this is an
6 important case. I am happy to be a Mediator on discovery
7 disputes.

8 I'm not going to -- probably not going to refer to a
9 Magistrate. I will make myself available for you to see that
10 we can get this case done in a good fashion.

11 So, what I'm saying is I'm available. But try not to
12 take advantage of my time. And I'm focused on this case now
13 that I know -- I think the document deadline is the 13th, which
14 is -- what's today's date -- which is tomorrow.

15 So I'm focused on the case. I'm here. I'm
16 available. I know it's a complex case. And I'm happy to
17 oversee it.

18 But you've got to meet-and-confer. And if there's
19 principle disagreements, reach out. And I'll do the best I can
20 to keep the case going. Is there anything else that you would
21 like to discuss, Mr. Harber, while we're on the phone?

22 MR. HARBER: Well, just briefly one thing,
23 Your Honor. And we appreciate the offer to help mediate. And
24 we certainly would try not to burden the Court with anything
25 that we don't need to.

1 On the documents deadline of tomorrow, I just wanted
2 to let Your Honor know that the Parties are currently
3 discussing an extension of that deadline. And so, we expect
4 that we will shortly be submitting a Stipulation, once we agree
5 on the particulars. But I wouldn't -

6 THE COURT: I'm sure a reasonable extension will be
7 -- request, if it's agreed to -- will be granted. But -

8 MR. HARBER: Okay.

9 THE COURT: - thanks for the heads up.
10 Mr. McLennan, anything you want to chat about, while we're all
11 on the phone?

12 MR. MCLENNAN: I have nothing further to add,
13 Your Honor. Thank you.

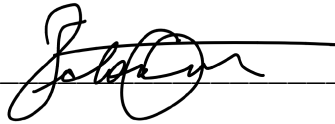
14 THE COURT: Okay. Everyone have a good weekend.
15 Thank you for your time. Take care.

16 MR. HARBER: Thank you.

17 (Proceedings concluded at 1:44 p.m.)
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C E R T I F I C A T I O N

I, VICTORIA O'CONNOR, court-approved transcriber,
certify that the foregoing is a correct transcript from the
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Victoria O'Connor, CET

October 14, 2023

Date

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